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No. 480

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1943

MRS. H. B. FUSTON AND STATE OF OKLAHOMA ON RELATION OF THE COMMISSIONERS OF THE LAND OFFICE OF SAID STATE,
PETITIONERS,

vs.

UNITED STATES OF AMERICA
RESPONDENT.

Petition For Writ Of Certiorari And Brief In Support Thereof

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UNITED STATES OF AMERICA
RESPONDENT.

Petition for Writ of Certiorari to The United States Circuit Court of Appeals for the Tenth Circuit and Brief in Support Thereof

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

The "Stipulation and Agreement" (Tr. 19-23) filed in the United States District Court for the Eastern

District of Oklahoma in the above case reveals that Sissie Folsom Pierce, a full-blood Choctaw Indian, was the owner of a tract of land in Bryan County, Oklahoma, subject to restrictions; that on October 15, 1927, she borrowed $2800.00 from the Permanent School Fund of the State of Oklahoma, same being administered by the Commissioners of the Land Office of said State, and together with her husband executed and delivered a mortgage in said amount on said land to said State and Commissioners; that said mortgage was not approved by the county court of Bryan County, Oklahoma, or by the county court of any other county thereof; that on June 15, 1931 an action was filed by said State on the relation of said Commissioners in the District Court of Bryan County against Mrs. Pierce and her husband to foreclose said mortgage on said land, a judgment of foreclosure being entered on January 11, 1932 (the Stipulation does not state or indicate that either the process, pleadings or proof in said action revealed that said land was subject to restrictions or that said judgment was for any reason void either on the judgment rolls or otherwise); that an order of sale was issued and said land sold to the State of Oklahoma, the sheriff's deed being filed for record in the office of the County Clerk of Bryan County, on December 30, 1932; that the State of Oklahoma has been in possession of said land since the recording of said deed, the defendant, Mrs. H. B. Fuston being the State's tenant thereof; that on July 12, 1933 Mrs. Pierce and her husband filed a motion to vacate said judgment but that same had never been "urged, presented or acted upon by the district court of Bryan County, Oklahoma."

On February 10 and April 10, 1942, almost ten years after the recording of said deed, the United States, as plaintiff, filed its complaint (Tr. 2) and its amended complaint (Tr. 12) in the instant ejectment action against the State's tenant, Mrs. H. B. Fuston, said action being filed by the United States in its own behalf and in behalf *first* of Mrs. Pierce and *later* of her heirs, demanding that Mrs. Fuston "be ejected and evicted from said land."

The State of Oklahoma on relation of the Commissioners of the Land Office, intervened and filed an answer and cross-complaint (Tr. 13-18) in effect contending that the State of Oklahoma had an *indefeasible* title in and right of possession of said land by reason of the making and delivery thereto of said sheriff's deed (same being set forth as "Exhibit A" of said answer and cross-petition), its subsequent recording and the doctrine of adverse possession or prescription (60 O. S. 1941 § 333-Appendix 1, and 12 O.S. 1941 § 93-Appendix 2). Inasmuch as said Exhibit "A" (Tr. 16-18) reveals that said sheriff's deed was issued as a result of the *final judgment* in said Bryan County foreclosure action, referred to in Paragraph VI of the Stipulation (Tr. 20-21), which judgment is attacked, as will hereinafter be shown, in the second amended petition filed by the United States, the validity of said judgment and the doctrine of "res adjudicata" is also raised by the pleadings.

On May 23, 1943, the United States filed a second amended petition (Tr. 23-26) as aforesaid, demanding that the State's *judgment of foreclosure* of January 11,

1932 in the Bryan County District Court and the order of confirmation of December 23, 1932, "be cancelled, set aside and held for naught" and that the resulting sheriff's deed of December 24, 1932, which was filed for record on December 30, 1932, "be cancelled, set aside and held for naught and expunged from the records of that office * * *."

The United States District Court held (Tr. 26-34) that while the State of Oklahoma's judgment of foreclosure in the Bryan County District Court was "a void judgment" (which holding the State believes was erroneous), said State had an *indefeasible* title to and right of possession of said land by adverse possession and prescription, and rendered judgment in favor of the State (Tr. 34-36) accordingly.

The Circuit Court of Appeals of the Tenth Circuit reversed said judgment (143 Fed. (2d) 76—Tr. 41-44) and in effect held:

> (First) that the State of Oklahoma had not acquired a title to and right of posession of said land as against Mrs. Pierce and her heirs by virtue of said *final judgment of foreclosure in the State court*, the execution, delivery and recording of said sheriff's deed and the doctrine of res adjudicata *which was binding on the United States District Court in the instant case*, for the reason that "the mortgage and *judgment in foreclosure* were void', and
>
> (Second) that since the State of Oklahoma in administering its public lands through the Commissioners of the Land Office acts in a sovereign capacity in the performance of a governmental

function and since the Legislature thereof had not authorized said State to be sued with respect to said function, the State of Oklahoma had not acquired title to and right of possession of said land "by adverse possession or prescription."

After the State's petition for a rehearing was denied (Tr. 46-47) on June 19, 1944, the mandate of the Circuit Court of Appeals in said case was issued to the United States District Court for the Eastern District of Oklahoma (Tr. 47). On September 11, 1944, the judge of said Court issued an order spreading said mandate of record but staying the execution thereof until September 19, 1944 pending an appeal to this Court and thereafter until final disposition of this cause thereby, a certified copy of which order is set forth in Appendix 3 hereof.

II.

STATEMENT OF BASIS OF JURISDICTION

It is believed that the jurisdiction of this Court to review the judgment in question is sustained by:

Section 240 of the Judicial Code, as amended (Title 28, Sec. 347, Subd. [a], U. S. C. A.) and

Rule 38, Sec. 5, Subsec. (b), Rules of the Supreme Court of the United States, as amended.

III.

QUESTIONS PRESENTED

Correctness of the Circuit Court's decision in effect holding that:

(1) The State of Oklahoma did not acquire a title to and right of possession of the land involved here as against Mrs. Pierce and her heirs by virtue of the State's *final judgment of foreclosure in the State court*, the execution, delivery and recording of said sheriff's deed and the doctrine of res adjudicata *which was binding on the United States District Court*, for the reason that " the mortgage and *judgment in foreclosure* were void", and

(2) Since the State of Oklahoma in administering its public lands through the Commissioners of the Land Office acts in a sovereign capacity in the performance of a governmental function and since the Legislature thereof has not authorized it to be sued with respect to said function, said State did not acquire title to and the right of possession of the land involved here by reason of said final judgment of foreclosure, the filing of its resulting sheriff's deed on said land in the office of the County Clerk of Bryan County and the doctrine of adverse possession or prescription.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The principles of law announced in the decision of the Circuit Court of Appeals herein (136 Fed. [2d] 76 Tr. 41-44) *are, when property analyzed, very far reaching, and if applied to their ultimate scope will not only open up for attack in the federal courts what has been deemed to be final adjudications in State courts, but will imperil many titles acquired either by the State or others at mortgage foreclosure sales.* In this connection it will be noted that if said principles of law are sound it necessarily follows:

(a) that a final judgment in an action, regardless of the nature thereof, filed by a State or any other party against an Indian or any other party *in a State court of competent jurisdiction*, in which action the court had jurisdiction of both the subject matter and the parties, is not res adjudicata as to the issues involved and decided in said action as to any of the parties thereto in a subsequent action filed *in a United States District Court* (assuming that said Court has jurisdiction of said action) by or on behalf of one of the parties of said State court action or his heirs or assigns against the other party to said action or his heirs or assigns, and

(b) that in the absence of a statute authorizing a State to be sued, *if the State voluntarily submits*

itself to the jurisdiction of a State court of competent jurisdiction by filing an action therein involving the title to and right of possession of a tract of land against a person owning or claiming to own the same or an interest therein, *in which action said person had the right and opportunity to defend but permits a judgment against him in favor of the State to become final*, the State not only does not acquire an indefeasible title to and right of possession of said land as against said person, his heirs or assigns by reason of the doctrine of *res adjudicata*, but said person, his heirs and assigns *will have the right ad infinitum* to file an ejectment action in a Federal District Court (assuming it has jurisdiction of said action) against a tenant of the State in possession of said land to eject and evict him therefrom, and, if the State intervenes in behalf of said tenant, to have the further right to cancel and set aside said final judgment of the State court as well as the State's resulting sheriff's deed to the land.

Wherefore, your petitioners pray that a writ of certiorari be issued from and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings therein; and that the judgment and decree of the said United States

Circuit Court of Appeals for the Tenth Circuit be reversed by this Honorable Court, and that your petitioners have such other and further relief as to this Court may seem proper.

Respectfully submitted,

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Brief in Support of Petition for Writ of Certiorari

FIRST PROPOSITION

The State of Oklahoma acquired an indefeasible title to and right of possession of the land involved here as against Mrs. Pierce and her heirs by virtue of the State's final judgment of foreclosure of January 11, 1932 in the District Court of Bryan County, the issuance of a sheriff's deed on said land thereto and the doctrine of res adjudicata, and said final judgment of said State court is binding on the United States District Court in a subsequent action filed therein (assuming that said court has jurisdiction of said action) by and between the same parties and their privies and involving the title to and right of possession of the same land.

In support of the above proposition attention is called to the case of *Peter, et al.* v. *Mozier, et al.*, 138 Okla. 288, 281 Pac. 141, wherein the second and third paragraphs of the syllabus are as follows:

> "A judgment rendered by a court having jurisdiction of the subject-matter and the parties, on the merits, is a bar to any future suit between the same parties, or *their privies*, upon the same cause of action, *in the same or another court*, so long as it remains unreversed and not in any way vacated or annuled.
>
> "A judgment is no less conclusive because it is based upon a *mistake of law*."

In connection with the above decision of the Supreme Court of Oklahoma it will be noted that the United States in the case at bar does not contend that in said foreclosure action in the District Court of Bryan County the court did not have jurisdiction of the subject matter and the parties.

Moreover, Paragraph VI of the stipulation herein (Tr. 20-21), *which paragraph contains the only statement in the transcript as to the process, pleadings and proof in said foreclosure action,* does not state or indicate, as aforesaid, that the land involved here was ever subject to restrictions or that the judgment of foreclosure in said case was for any reason void either on the judgment rolls or otherwise.

Therefore, even though the judgment in said case was based on "a mistake of law", *as apparently contended by the United States,* such fact does not prevent said judgment from being "res adjudicata" as to the title and right of possession of the land involved in the instant case, *same being between the same parties or their privies and involving the same tract of land as in the Brayn County case.*

The principles of law announced in the *Peter case, supra,* were followed in the case of *Cherry, et al.* v. *Godard, et al.,* 179 Okla. 158, 64 Pac. (2d) 315, wherein the first and second paragraphs of the syllabus lay down the following rules of law:

> "When an issue of *law or fact* is once tried upon the merits and finally decided by a court of competent jurisdiction having jurisdiction of the sub-

> ject-matter and of the parties and the power to decide the issue, *the same question cannot thereafter be retried and decided differently in another subsequent and different action between the same parties*, provided, of course, the plea of res adjudicata or estoppel by judgment is properly presented by the pleadings. * * *
>
> "The finality of a judicial decision depends upon the jurisdiction of the court and the existence of power to make the decision *rather than the correctness of the decision rendered.*"

In the case of *King, et al.* v. *Rogers*, 123 Okla. 228, 253 Pac. 95, the first paragraph of the syllabus is as follows:

> "A judgment determining the right of an Indian to property at issue and unappealed from *is res judicata in a subsequent action between the same parties on the same issues.*"

The principles of law announced in the above cases are controlling even as to a judgment rendered by *default* or *on demurrer*. In this connection attention is called to the case of *Swift and Company* v. *Walden*, 176 Okla. 268, 55 Pac. (2d) 71, wherein the sixth paragraph of the syllabus is as follows:

> "The principle of res adjudicata is as applicable to a *default judgment* on proper issuance and service of summons or other appropriate process, as to any other kind of a judgment.",

and to the case of *Goldsborough, et al.* v. *Hewitt*, 23 Okla. 66, 99 Pac. (2d) 907, wherein it is held:

> "It is well settled that, where a *demurrer* runs

> to the merits of the case, the judgment of the court sustaining it and dismissing the bill *is a judgment upon the merits of the controversy,* and is a bar to any subsequent suit between the said parties upon the same cause of action."

It is true that after said judgment of a foreclosure of January 11, 1932 was handed down in the Bryan County case, Mrs. Pierce and her husband on September 12, 1933 filed a motion therein to vacate said judgment, but it is stated in the last sentence of Paragraph VI of the stipulation herein (Tr. 21) that said motion has never been

> "urged, presented and acted upon by the district court of Bryan County, Oklahoma",

and said motion has been treated by *all parties* in the instant case as having been abandoned.

However, assuming that said motion to vacate has not been abandoned, it does not mean that said judgment of foreclosure (unless and until vacated by motion or petition in the case in which it was rendered as provided by 12 O.S. 1941 §§ 1031-1038) is not res adjudicata as to the parties thereto *and their privies* in relation to the issues deciding therein, to-wit, the title to and right of possession of the land involved here.

SECOND PROPOSITION

When the State of Oklahoma voluntarily submitted itself to the jurisdiction of the District Court of Bryan County, Oklahoma, by filing therein the mortgage foreclosure action heretofore mentioned against Mrs. Pierce and her husband (de-

fendants in said case) involving the title to and right of possession of the land involved in the case at bar, in which action said defendants had the right and opportunity to defend but permitted a judgment against them of foreclosure of said land to become final and the State to acquire title to and right of possession of said land by sheriff's deed, the State not only acquired an indefeasible title to and right of possession of said land as against said defendants, their heirs and assigns by virtue of the doctrine of "res adjudicata, (see first proposition hereof), but by reason of the filing of said sheriff's deed for record in the office of the County Clerk of Bryan County on December 30, 1932 and the failure of defendants, their heirs or assigns to file a motion or petition to vacate said judgment and resulting sheriff's deed within five years thereafter (other than the abandoned motion, heretofore mentioned), the State acquired title to and right of possession of said land by adverse possession and prescription as provided 60 O. S. 1941 § 333 (Appendix 1) and 12 O. S. 1941 § 93 (Appendix 2), and the fact that the Legislature of Oklahoma has not passed appropriate legislation authorizing the State to be sued is immaterial.

In support of the above proposition attention is called to the general rule which appears in 49 Am. Jur., page 297, § 84, as follows:

> "Generally speaking, *when a state voluntarily places itself in the position of a suitor*, whether in its own courts or in those of a sister state, it will be held to have laid aside its sovereignty and to have taken on the garb of an ordinary suitor, so

> *far as concerns all proper matters of adjudication growing out of the cause sued on,* and the defendant will be entitled to plead and prove any and all matters properly defensive. Hence, a state by bringing an equitable action opens the door to any defense or cross complaint germane to the matter in controversy. * * *"

There are many decisions which uphold the above general rule but the State deems it necessary to call the Court's attention to only one thereof, same being the recent case of *Commonwealth of Massachusetts* v. *Davis,* (Texas), 160 S.W. (2d) 543, decided April 15, 1942. In this connection we quote from said case as follows:

> "The general rule that a state may not be sued without its consent is not applicable here. *The state itself instituted this suit, and the rule applicable is that when 'a state voluntarily files a suit and submits its rights for judicial determination, it will be bound thereby, and the defense will be entitled to plead and prove all matters properly defensive.* This includes the right to make any defense by answer or cross-complaint germane to the matter in controversy.' *Anderson, Clayton & Co.* v. *State,* 122 Tex. 530, 62 S.W. (2d) 107, 110; *State* v. *Zanco's Heirs,* 18 Tex. Civ. App. 127, 44 S.W. 527, writ denied. In support of its above quoted rule, the Supreme Court cited 25 R.C.L. § 46, p. 411, wherein the authorities supporting the rule are collated, and which hold that the rule applies when a sister state is the plaintiff in the suit. 59 C. J. 319, 320 § 476; *State* v. *Arkansas Brick & Mfg. Co.,* 98 Ark. 125, 135 S.W. 843, 33 L.R.A., N.S., 376. *Some courts hold that the*

> *state, by submitting to the jurisdiction of its judicial tribunals, waives any right to plead its immunity, at least to the extent of its own claim;* while others hold that the defendant may have an affirmative judgment for any amount in excess of the state's claim where the defendant's claim is incident to, connected with, arises out of, or is germane to the suit or controversy. See *State* v. *Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 135 S.W. 843, 33 L.R.A., N.S., 376, 377; 25 R.C.L., § 47, p. 411, and cases there cited. Our Supreme Court adopted the latter rule in the *Anderson, Clayton & Co.*, case."

It should be here noted that while the Supreme Court of Oklahoma held in *Goodin* v. *Commissioners of the Land Office*, 174 Okla. 364, 50 Pac. (2d) 189 and *State* v. *Ward*, 189 Okla. 532, 118 Pac. (2d) 223 (which cases are cited in the decision of the Circuit Court herein) that the Oklahoma statute of limitations applicable to civil actions did not begin to run in an action against the State until the State by legislative enactment had consented to be sued, said cases are not controlling here since in neither thereof had the State of Oklahoma theretofore voluntarily submitted itself to the jurisdiction of a court of competent jurisdiction by filing an action against the plaintiff involving the same issues as were involved in said case.

That a sale of real estate under an order of sale issued in a mortgage foreclosure proceeding is a sale on execution within the meaning of subdivision (1) of 12 O. S. 1941 § 93, *supra* (Appendix 2), is shown by the case of *Goslen* v. *Waddell Inv. Co., et al.*, 145 Okla.

269, 292 Pac. 362, wherein the first, second, third and fourth paragraphs of the syllabus are as follows:

> "1. A sale of real estate under an order of sale issued in a *mortgage foreclosure proceeding is* a sale on execution within the meaning of subd. 1, section 183 C.O.S. 1921 [12 O. S. 1941 § 93]. An action by the judgment debtor to recover the property so sold must, therefore, be brought within five years after date of the recording of the sheriff's deed executed in pursuance of such sale.
>
> "2. Paragraph 1 of section 183, supra, [12 O. S. 1941 § 93] in creating the limitation against the recovery of real estate sold on execution in a judicial proceeding, after five years from the date of the filing of the sheriff's deed to the purchaser, *does not distinguish between void and voidable judgments* which result in the sale and conveyance of the land.
>
> "3. Occupancy for the period prescribed by Civil Procedure, or any law of this state, as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which *is sufficient against all. Stolfa* v. *Gaines*, 140 Okla. 292, 283 Pac. 563.
>
> "4. The title to real property acquired by prescription or adverse possession is respected in courts of equity, as well as in courts of law; *and the title so acquired is available either for attack or defense;* and this is so whether the action is legal or equitable in its nature. *McGowan* v. *Carlton*, 143 Okla. 106, 288 Pac. 338."

However, assuming that the five year statute of limitations set forth in Subdivision 1 of 12 O. S. 1941

§ 93 (Appendix 2) is not controlling in the case at bar for the reason that (as apparently held by the Circuit Court) the Bryan County foreclosure action was void *since the foreclosed mortgage was on lands subject to restrictions and not approved by the Court* (such facts are not revealed or indicated by the pleadings and proof in said case as set forth in the transcript herein), if the contention of the United States is sound the heirs of Mrs. Pierce or their privies (here the United States) has *the right ad infinitum* to file an ejectment action in the United States District Court (assuming it has jurisdiction of the action) against a tenant of the State in possession of said land (here Mrs. Fuston) to eject and evict him therefrom, and, if the State intervenes in behalf of said tenant (as the State did here) the further right to cancel and set aside said final judgment in the State court as well as the State's resulting sheriff's deed to said land, even though:

(a) a final judgment in a State court between the same parties or their privies determining the title and right of possession of said land in the adverse party is presented as "res adjudicata" in the Federal court, and

(b) the State had held open and notorious adverse possession of said land for more than *fifteen years* within the meaning of the fourth subdivision of Section 93, supra, same not requiring such possession to be authorized by a judgment in a court action.

CONCLUSION

WHEREFORE, in consideration of the premises, petitioners respectfully ask this Court to issue the Writ of Certiorari prayed for in their petition herein.

Respectfully submitted,

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